

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
FLORIDA POWER AND LIGHT COMPANY)	FCC File No. 750298
)	
Request for Waiver and Application to Re-license)	
Operational Fixed Microwave Station WNTT490)	
with Primary Status)	
)	
)	

ORDER

Adopted: April 25, 2000

Released: April 28, 2000

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. Florida Power and Light Company (FPL) operates several fixed microwave services (FMS) radio stations in the 2 GHz band and inadvertently allowed the license for one of its stations to expire. FPL now has filed an application¹ to re-license the facility and requests a waiver of Section 101.81 of the Commission's Rules that would otherwise require that the station be authorized on a secondary basis.² For the reasons stated herein, we grant FPL's request for a waiver of Section 101.81 of the Commission's Rules.

II. BACKGROUND

2. The Commission has reallocated portions of the 2 GHz band from FMS to emerging technology (ET) services, including the personal communications services.³ To this end, the Commission has adopted certain transition rules.⁴ In doing so, the Commission balanced the needs of incumbent FMS licensees to continue to operate their systems with the need to conserve vacant 2 GHz spectrum for use by ET licensees, to provide ET licensees with a stable environment in which to plan and implement new

¹Application for Authorization in the Microwave Services (FCC File No. 750298) (filed July 9, 1999).

²Florida Power and Light Company Request for Waiver (filed July 9, 1999) (Waiver Request).

³Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992) (*ET First Report and Order*).

⁴See 47 C.F.R. §§ 101.69-101.81. The rules are intended to reaccommodate the FMS licensees in a manner that would be most advantageous for the incumbent users, least disruptive to the public and most conducive to the introduction of new services. See *ET First Report and Order*, 7 FCC Rcd at 6886-87 ¶ 5.

services, and to prevent ET licensees from bearing any additional costs of relocating FMS licensees.⁵ Thus, rather than immediately clearing the 2 GHz band of the incumbent FMS users, the Commission permits the incumbents to continue to occupy the band on a co-primary basis with the ET licensees for a period of time, by the end of which the incumbents are to relocate to another portion of the spectrum.⁶ ET licensees have the option, however, of requiring the FMS incumbents to relocate sooner if the ET licensees pay the additional costs caused by the earlier relocation.⁷ Second, the Commission is authorizing new FMS stations and most modifications of FMS stations only on a secondary basis to ET systems.⁸ Most minor modifications of FMS stations are also authorized on a secondary status unless the licensee can demonstrate that it needs primary status and the modifications will not add to the relocation costs to be paid by the ET licensee.⁹ The result is that while incumbent FMS licensees are able to continue operating their systems with primary status – as those systems currently exist – any expansions and most modifications to the systems result in secondary status.

3. FPL is an electric utility serving approximately 7 million customers in 35 counties in eastern and southern Florida.¹⁰ It maintains an extensive communications system to monitor its power grid and dispatch personnel for both routine and emergency system maintenance.¹¹ Station WNTT490, Baldwin, Florida, is an integral part of FPL's communications system, carrying all the control circuits used by FPL's repeaters, which link FPL's radio system throughout the state.¹² The expiration date for FPL's license for Station WNTT490 was November 28, 1998. FPL timely filed a renewal application, but the application was returned for correction of antenna registration information.¹³ Under the rules then in effect, a microwave application that was returned for correction would be processed in original order of receipt if it was resubmitted within sixty days of the date on which it was returned, but would be treated as a new application if it was resubmitted after the prescribed time.¹⁴ FPL states that an administrative oversight and difficulties associated with the transition to new FPL counsel caused a delay in resubmitting the renewal application until July 9, 1999, after the sixty-day resubmission period ended.¹⁵ Thus, because a complete renewal application was not filed in a timely manner, the license term for Station WNTT490

⁵*ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5, 6891 ¶ 30; Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825, 8866-69 ¶¶ 86-88 (1996) (*Cost Sharing First Report and Order*).

⁶47 C.F.R. §§ 101.69(b), 101.79(a). *See also ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5.

⁷*See* 47 C.F.R. §§ 101.69(a), 101.71-101.77.

⁸47 C.F.R. § 101.81.

⁹*Id.*

¹⁰Waiver Request at 1.

¹¹*Id.*

¹²*Id.*

¹³*See* Application Return Notice from FCC, Gettysburg to FPL (Feb. 3, 1999).

¹⁴47 C.F.R. § 101.35(c) (1998).

¹⁵Waiver Request at 1-2.

expired as of November 28, 1998.¹⁶ As a result, the current application will be treated as an application for a new station. In connection with its application, FPL requests a waiver of the Commission's Rules that provide that new FMS stations in the 2 GHz band are authorized on a secondary basis to ET licensees.

III. DISCUSSION

4. In this case, we note, as an initial matter, that the station at issue was originally authorized with primary status, but that authorization has terminated. FPL now requests a waiver of the Rules so that its new station license can be accorded primary status. Section 1.925(b)(3) of the Commission's Rules provides that we may grant a request for waiver when (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case and a grant of the requested waiver would be in the public interest, or (ii) in view of the unique or unusual circumstances of the case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹⁷ For the reasons set forth below, we conclude that grant of the requested waiver is warranted. We therefore will grant FPL's request for a waiver of the Rules.

5. We find that application of the rules would be inequitable in light of the circumstances of this case. FPL has sought no modifications to the previously licensed Station WNTT490. Unlike other cases where we have denied requests for waiver of the requirement that new 2 GHz licenses be granted on a secondary basis,¹⁸ FPL timely filed its renewal application. It is clear that FPL intended to renew its license.¹⁹ In addition, we note that the defect in FPL's renewal application did not relate to FPL's actual operations. Rather, the application was returned to allow FPL to comply with the Commission's antenna structure registration process, which was substantially revised in November 1995.²⁰ Accordingly, we believe that application of the rule in this case would be inequitable. Further, we believe that granting Station WNTT490 primary status would not undermine any of the goals of the Commission as laid out in the 2 GHz rulemaking proceeding and would not add to the cost of relocating FPL's facility. Under these circumstances, we conclude that it is appropriate to grant FPL's waiver request and allow Station WNTT490 to be licensed with primary status.²¹

¹⁶See 47 C.F.R. § 101.65(a) (1998) (currently codified at 47 C.F.R. § 1.955(a)(1)).

¹⁷47 C.F.R. § 1.925(b)(3).

¹⁸See, e.g., *Plumas-Sierra Rural Electric Cooperative, Order*, DA 00-628 (WTB PSPWD rel. Mar. 22, 2000); *Tampa Electric Company, Order*, DA 99-2793 (WTB PSPWD rel. Dec. 16, 1999).

¹⁹See *Medina Electric Cooperative, Inc., Order on Reconsideration*, DA 99-2314, ¶ 6 (WTB PSPWD rel. Oct. 26, 1999).

²⁰See *Streamlining the Commission's Antenna Structure Clearance Procedure, Report and Order*, WT Docket No. 95-5, 11 FCC Rcd 4272 (1995), *aff'd*, *Memorandum Opinion and Order and Order on Reconsideration*, FCC 00-76 (rel. March 8, 2000).

²¹See Letter from Robert H. McNamara, Chief, Private Wireless Division to Carole C. Harris, McDermott, Will & Emery (May 20, 1996), (granting waiver of Section 101.81 where renewal application was filed timely but could not be processed due to problem with applicant's credit card, and corrected application was filed after license expired), *affirmed on other grounds*, *Pacific Gas and Electric, Memorandum Opinion and Order*, 14 FCC Rcd 13400 (WTB PSPWD 1999).

IV. CONCLUSION

6. For the reasons discussed above, application of the rule according secondary status to all new 2 GHz applications would be inequitable under the circumstances of this case. We therefore grant FPL's request for a waiver of Section 101.81 of the Commission's Rules, and forward the application to the Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch, for processing in accordance with this decision and the applicable Commission Rules.

V. ORDERING CLAUSES

7. ACCORDINGLY, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Sections 1.925 and 101.69 of the Commission's Rules, 47 C.F.R. §§ 1.925, 101.69, the Request for Waiver of Florida Power and Light Company, filed on July 9, 1999, IS GRANTED.

8. IT IS FURTHER ORDERED that Florida Power and Light Company's pending application shall be processed in accordance with the applicable Commission Rules.

9. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Private Wireless Division
Wireless Telecommunications Bureau